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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1720

CONNIE SUE BAYSINGER, *et al.*,

Appellants,

v.

STATE OF INDIANA,

Appellee.

On Appeal From the Supreme Court of Indiana
MOTION TO DISMISS OR AFFIRM

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IN THE

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CONNIE SUE BAYSINGER, *et al.*,

Appellants,

v.

STATE OF INDIANA,

Appellee.

MOTION TO DISMISS OR AFFIRM

The appellee, the State of Indiana, respectfully moves this Court to dismiss this appeal or affirm the judgment of the Supreme Court of Indiana entered by that Court in Cause No. 1078 S 202, on December 3, 1979.

OPINIONS BELOW

The Opinion of the Supreme Court of Indiana is reported at 397 N.E.2d 580. That opinion and two dissenting opinions by justices of that court are appended to the Appellants' Jurisdictional Statement. This Court's summary dismissal of an appeal from the same Indiana Supreme Court decision by another party (*Clark v. Indiana*, No. 79-1325) is attached hereto as Appendix A.

JURISDICTION

Appellants allege that jurisdiction of the Supreme Court of the United States to review the judgment of the Supreme Court of Indiana on appeal in this case is conferred by Title 28, United States Code, Section 1257(2). However, appellees would assert that there is no jurisdiction in this court to review this case on appeal since there is no substantial federal question involved, and since the decision appealed from rests sufficiently on state grounds.

QUESTIONS PRESENTED BY THE APPEAL

The appellee would assert that the issues presented in this appeal are:

1. Whether the appellant has properly presented to this Court a federal question of substance.

2. Whether the appellant has the necessary standing to raise overbreadth and vagueness challenges to the constitutionality of Indiana Code Section 35-45-4-1(a)(3) and (b).

Appellants have alleged that there is a federal question in their assertion that portions of IC 35-45-4-1, which prohibits a person (not just a "female" as asserted by appellants) from appearing nude in a public place, is in conflict with the free speech clause of the First Amendment to the Constitution of the United States, as applied to the State by the Fourteenth Amendment, due to the alleged factual overbreadth and vagueness of the statute.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Appellants have alleged the involvement of the following provisions of the Constitution of the United States:

Amendments, Article One:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Amendments, Article Fourteen:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

"* * *"

Indiana Code, Section 35-45-4-1 is in issue. The full text of the Statute is as follows:

35-45-41. [Public indecency]—(a) A person who knowingly or intentionally, in a public place:

(1) Engages in sexual intercourse;

(2) Engages in deviate sexual conduct;

(3) Appears in a state of nudity; or

(4) Fondles the genitals of himself or another person; commits public indecency, a class A misdemeanor.

(b) "Nudity" means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of covered male genitals in a discernibly turgid state.

A class A misdemeanor in Indiana carries a penalty of a term of imprisonment fixed at from one day to one year to which in addition may be added a fine of not more than $5,000.00. Indiana Code 35-50-3-2.

STATEMENT OF THE CASE

I. Nature of the Case

This appeal, filed by plaintiff below, arises from a consolidated case wherein the Supreme Court of Indiana upheld the validity of IC 35-45-4-1, facially and as applied, thereby reversing the trial court cases which were appealed to that Court by the State of Indiana; among these cases are the ones brought to this Court by this direct appeal. The trial court cases subject of this appeal were commenced on December 29, 1977, by the filing of four different informations by the Prosecutor of Allen County, Indiana, against the four respective appellants, Dove, Pinkston, Petre, and Johnson, taking this appeal, charging violations of IC 35-45-4-1(a)(3). Baysinger is the name of a party in a case consolidated with these appellants' cases in the Indiana Supreme Court; she is not a party to this appeal, which should probably therefore be called *Dove v. Indiana.*

II. Course of the Proceedings Below

As stated immediately above, appellants were charged on December 29, 1977 by four informations filed in Allen County, Indiana, with violations of IC 35-45-4-1(a)(3).

Appellees do not disagree with appellants' characterization of the contents of the informations. The individual defendants (appellants herein) filed identical motions to dismiss and discharge the indictments.

The trial court granted without opinion the motions to dismiss, on May 17, 1978. The State appealed directly to

the Indiana Supreme Court, consolidating with the *Baysinger* case under Cause No. 1078 S 202.

In that Court, these cases were consolidated with two others in which a Superior Court had found IC 35-45-4-1 (a)(3) unconstitutional. *City of South Bend, et al. v. Kitty Kat Lounge, Inc.*, No. 1078 S 227, in which the appellees sought and obtained injunctive relief to prevent the city police and others from enforcing the statute; and *Lake County Prosecutor and State of Indiana v. Sue Clark*, No. 978 S 193, in which the appellee sought and obtained declaratory relief as to the constitutionality of the statute.

These cases were decided in favor of the constitutionality of IC 35-45-4-1 by the Indiana Supreme Court on December 3, 1979. That decision, and two dissenting opinions, are printed as Appendix B to appellants' "Jurisdictional Statement," and are reported under the name *State v. Baysinger*, — Ind. —, 397 N.E.2d 580 (1979).

These appellants, Dove, Pinkston, Petre, and Johnston, brought this appeal.

Since then, this Court, on May 12, 1980, dismissed for want of a substantial federal question, *Clark v. Indiana* which, like this case, was an appeal from *State v. Baysinger, supra.*

III. Facts Relevant to the Issues Presented For Review

Since this case was appealed from a granting of a motion to dismiss, there are very few facts of record. The decision of the Indiana Supreme Court which is the subject of this appeal, appears to accept as fact that all the appellees therein (including appellants here) were employed as dancers and appeared nude or would do so but for the statute. Since the four appellants in this case originally prevailed on a motion to dismiss, the facts alleged in the dismissed

complaint, taken as if true for appellate purposes, are that each of them appeared showing either the female breasts with less than a fully opaque covering of any part of the nipple, or the buttocks with less than a fully opaque covering, in a bar in Fort Wayne, Indiana, called "The Scorpion."

REASONS FOR DISMISSING THE APPEAL OR AFFIRMING THE JUDGMENT BELOW

1. Appellant does not present to this Court a Federal Question of Substance.

This Court has scrupulously adhered to the rule that it will not review judgments of state courts which rest upon non-federal or independent state grounds sufficient to support the judgment. *Henry v. Mississippi,* 379 U.S. 443, 85 S.Ct. 564, 13 L.Ed.2d 242 (1965); *Herb v. Pitcairn,* 324 U.S. 117, 65 S.Ct. 459, 89 L.Ed. 789, supp.op. 325 U.S. 77, 65 S.Ct. 954, 89 L.Ed. 1483, reh. den. 325 U.S. 893, 65 S.Ct. 1188, 89 L.Ed. 2005 (1945).

The state court opinion appealed from herein addressed two main issues: Whether the statute is vague, and whether the statute is overbroad in that it, while properly embracing and regulating appellant's own actions, sweeps too broadly and regulates impermissibly other conduct which is protected against such regulation.

Appellees would assert that both main issues were decided on non-Federal grounds.

The vagueness argument rested on the use of the term "public place", not specifically defined in IC 35-45-4-1, as the definition of the places where the conduct proscribed by the statute is punishable. The Indiana Supreme Court found that in Indiana law the basis for the offense of public indecency has been consistent in state law and that

"public" in this context clearly meant, in Indiana law, "any place accessible to the public"; that is, any place where the public is invited and are free to go upon special or implied invitation—a place available to all or a certain segment of the public." *State of Indiana v. Baysinger,* — Ind. —, 397 N.E.2d 580 (1979), citing *Peachey v. Boswell,* 240 Ind. 604, 167 N.E.2d 48, 56-57 (1960). Clearly, the Court's finding of no impermissible vagueness in IC 35-45-4-1 rests on purely State law, and cannot be a subject of appellate review in this action.

Appellants reiterate a question not specifically treated in the Indiana decision by alleging that there is impermissible vagueness in the statutory definition of "nudity," IC 35-45-4-1(b). The two clauses so attacked are "showing of the human male or female buttocks with less than a fully opaque covering, [or] the showing of the female breast with less than a fully opaque covering of any part of the nipple. . .". They claim use of the terms "buttocks" and "any part of the nipple" are so vague that the statute leaves a citizen uncertain what is supposed to be covered.

The basic standard in a vagueness claim is that the statute give fair warning of conduct which it prohibits to persons of ordinary intelligence. *Bouie v. City of Columbia,* 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964). Absolute precision is not a constitutional requirement as long as the statute fairly indicates to a reasonable man what actions are prohibited. *Baggett v. Bullit,* 377 U.S. 360, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964).

The common ordinary meaning of the words employed by the statute provide the requisite fair notice to any reasonable person. Appellants purport not to understand where the buttocks start so that they don't know what must be covered. Webster's Second International Dictionary, Una-

bridged, defined "buttock" thus: "The part at the back of the hip, which in man forms one of the protruberances on which he sits; in *pl.*, the rump." The American Heritage Dictionary defines "buttock" as "Either of the two rounded parts of the rump." It is obvious that the whole rounded protruberances at the back of the hips are what is to be covered and that the words of the statute are clearly ascertainable by any reasonable person.

Appellants do not allege to be uncertain as to what a "nipple" is or where it starts. Their alleged confusion is over which part the "any part" of it is that must be covered, and hypothesize that this "any part" may be the size of a pinhead. Thereby they are straining the word "any" into an obviously unintended interpretation. The word "any" in the statute does not refer to a part covered but to a part "with less than a fully opaque covering." If any such part exists, the statute is violated. It is a clear requirement to leave no such part uncovered. Again, it is not vague, being clearly understood by a reasonable person.

The remaining issue in the Indiana Supreme Court decision was whether the statute is overbroad in that its sweep extended impermissibly into realms of speech protected by the First Amendment of the Constitution of the United States.

The opinion being appealed from makes it clear that public indecency has long been punishable in Indiana, always including within its prohibition nudity in a public place. *McJunkins and Others v. The State of Indiana,* 10 Ind. 140, 145 (1858); *Ardery v. State of Indiana,* 56 Ind. 328 (1877). The current statute has been on the books only since 1977 because of a general recodification of the criminal law of the State of Indiana occurring that year.

The offense of public indecency was thought to be a crime at common law. *Yauch v. City of Tucson,* 514 P.2d 709, 710 (Ariz., 1973); *Starshock, Inc. v. Shusted,* 370 F.Supp. 506, 508 (1974); *Hoffman v. Carson,* 250 So.2d 891, 49 A.L.R.3d 1078 (Fla., 1971), app. dism'd 404 U.S. 981, 92 S.Ct. 453, 30 L.Ed.2d 365 (1971). Because of the relationship to the public welfare of exposing sexual organs and nudity, regulation or prohibition thereof has been held to be within the police power of the State Legislature. *Hoffman, supra; Starshock, Inc., supra; Wayside Restaurant, Inc. v. City of Virginia Beach,* 208 S.E.2d 51, 53 (Va., 1974); *State of Ohio ex rel. Church v. Brown,* 133 N.E.2d 333, (Ohio, 1956), app. dism'd 352 U.S. 884, 77 S.Ct. 126, 1 L.Ed. 2d 82.

This Court recognized that the State may regulate public nudity when, in *Miller v. California,* 413 U.S. 15, 93 S.Ct. 2607 at 2615-2616, 37 L.Ed.2d 419 (1973), it said, "Sex and nudity may not be exploited without limit by films or pictures exhibited or sold in places of public accommodation *any more than live sex and nudity can be exhibited without limit in public places.*" (emphasis added); lewd public conduct itself is within the permissible bounds of state regulation, even if a verbal description of it might in some circumstances be protected. *Miller, supra,* 413 U.S., at 26 n. 8, 93 S.Ct. 2607, 37 L.Ed.2d 419.

The Court reiterated the point later in *Erzoznik v. City of Jacksonville,* 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975):

> "Scenes of nudity in a movie, like pictures of nude persons in a book, must be considered as a part of the whole work. . . . In this respect such nudity is distinguishable from the kind of public nudity traditionally subject to indecent exposure laws. . . . ('No one would suggest that the First Amendment

permits nudity in a public place'). (citations omitted.) *Id.* at 211, 95 S.Ct. at 2273, n. 7''

The *Miller* and *Erzoznik* cases thus, in a context which has bearing on the instant case, clearly distinguish statutes which, like IC 35-45-4-1, are directed at conduct instead of speech, from obscenity statutes, which are directed at speech itself. The ability to legislate against conduct exists even when directly exercised against actions which do have some degree of expressive value. *United States v. O'Brien, post.* (Appellants herein do not allege that there is any expressive content to the nudity in their dancing, or indeed in the dancing itself.)

In *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d (1975), this court stated that ''. . . the customary 'barroom' type of nude dancing may involve only the barest minimum of protected expression. . . .''

The leading case of *United States v. O'Brien,* 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), would allow state regulation of conduct even ''. . . when 'speech' and 'nonspeech' elements are combined in the same course of conduct''; a ''sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on the First Amendment.'' *id.* at 367, 88 S.Ct. at 1678. (*O'Brien,* of course, involved a symbolic protest against a broad range of governmental policies connected with war and military draft registration, and thus a rather serious expressive content.)

The argument against granting the appeal can be summarized as follows: (1) The State's power to regulate public nudity is long-standing and is a valid exercise of the police power; (2) it serves an important governmental interest in order, decency, morality, and public welfare. (3) Public indecency statutes prohibiting public nudity, in-

cluding IC 35-45-4-1, are directed against conduct only, and not against any kind of speech. (4) Injury to the small amount of protected speech, if any, is incidental and insubstantial when compared to the legitimate sweep of the statute. (5) There is, therefore, no "right", federally-protected or otherwise, to go naked in a public place, free of the strictures of such public indecency statutes. (6) There is no vagueness issue cognizable in this action concerning Indiana's definition of "public place" because the vagueness allegation raised in this cause has already been settled by the state courts on all-state grounds. (7) Appellants have alleged the existence of no attempt at expression in the course of the enterprise involved. (8) Appellants' nude dance conduct thus included no federally-protected right and the State's regulation of their costuming could not have affected any personal federally-protected right. (9) Therefore, no substantial federal question has been raised herein, and the appeal ought to be dismissed or judgment affirmed.

Against this argument, supported as it is by the authorities given above, Appellants allege a "right" to dance nude in public, which is apparently based on just two cases, *California v. LaRue,* 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972); and *Doran v. Salem Inn, Inc.,* 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975).

LaRue, of course, *upheld* California's ability to prohibit nude barroom dancing, which is precisely the conduct Appellant was engaged in. The majority opinion in that case held *both* that the Twenty-First Amendment conferred ". . . something more than the normal state authority over public health, welfare and morals . . ." when in connection with regulation of the alcoholic beverage trade, *and* that ". . . the States, vested as they are with general police

power, require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power . . .'' 401 U.S. at 114, 93 S.Ct. at 395. *LaRue,* therefore, does not stand for the proposition that a State cannot enact a general ban on public nudity aside from on ''licensed premises''. It is more accurate to characterize *LaRue* by saying that the State has a great deal of power to legislate concerning public indecency, which is only strengthened by the operation of the Twenty-First Amendment.

The *Doran* case should not have been cited for any substantive proposition regarding nudity. It was interlocutory only, and in essence held merely that since there might exist a set of facts in which nude dancing might contain protected expression, a Federal District Court Judge could not as a matter of law be said to have violated his discretion in enjoining enforcement of an anti-nudity statute. This Court explicitly stated in *Doran* that its refusal to rule against the lower court's grant of interim relief was limited to its upholding of judicial discretion, and expressed no view as to the merits of the contentions of the respondent, who was the proponent of the ''right'' to nude public dancing. 422 U.S. at 933, 95 S.Ct. at 2569.

Subsequent cases have adopted, or at least supported, the above view of the *Doran* case. The Supreme Judicial Court of Maine noted that in *Doran,* this Court held, at most, ''. . . that 'the customary ''barroom'' type of nude dancing' *may involve* only the barest minimum of protected expression.'' *Gabriel v. Town of Old Orchard Beach,* 390 A.2d 1065 at 1069 (Me., 1978). Emphasis of the court's. In *Kew v. Senter,* 416 F.Supp. 1191 (U.S.D.C.No.D. Tex., 1976), the court took due note of *Doran* and held nevertheless that the Texas statute therein was, ''. . . primarily, if

not exclusively, directed at nonverbal, physical conduct, an activity which Texas has greater constitutional power to regulate than speech in general . . .'' *id.* at 1104.

It is entirely clear, therefore, that on the facts in this appeal, there is no substantial federal question.

2. Appellant does not have necessary standing to raise an overbreadth challenge to IC 35-45-4-1.

It is a basic constraint to challenges to statutes that a person must not raise or argue the constitutional rights of others. Constitutional rights are personal, and courts normally consider allegations of unconstitutionality only in light of the particular facts brought forth by the plaintiff. *Broadrick v. Oklahoma,* 413 U.S. 60, 93 S.Ct. 2908, 37 L.Ed. 2d 830 (1973). This proposition, if there were not an exception, would end our discussion here since appellants brought forth no such facts, alleging a curtailment of any expression in their dance, and failed to establish a right to engage in commercial nude barroom dancing. When the constitutional challenge does not factually apply to the litigant, the overbreadth exception may permit the challenge if the overbreadth extends to the area of free speech and the case involves a statute's facial invalidity. However, this exception is carefully limited. It does not apply if a statute marginally infringing upon a third-person's First Amendment rights as a whole does cover a range of easily identifiable and properly prohibited conduct. *U.S. Civil Service Commission v. National Association of Letter Carriers,* 413 U.S. 458, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973). Another limitation to the facial overbreadth exception exists if conduct as well as speech is involved, and where, although the overbreadth to others may be real, such overbreadth is not substantial, judged in relation to the statute's plainly legiti-

mate sweep. In *Broadrick v. Oklahoma, supra,* this Court stated:

> "... But the plain import of our cases is, at the very least, that facial overbreadth adjudication is an exception to our traditional rules of practice and that its function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from 'pure speech' toward conduct and that conduct—even if expressive—falls within the scope of otherwise valid criminal laws that reflect legitimate state controls over harmful, constitutionally unprotected conduct. Although such laws, if too broadly worded, may deter protective speech to some unknown extent, there comes a point where that effect—at best a prediction—cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe. (citation omitted) To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."

Broadrick, id. at 615, 93 S.Ct. at 2917-18, 37 L.Ed.2d at 842.

Case law has plainly established that public nudity is conduct, not speech. The overbreadth adjudication exception has therefore been attenuated, to an extent that the conduct of public nudity, even if expressive, is within the scope of legitimate state controls and is justified for the reasons given in *Broadrick, supra.*

In *Kew v. Senter,* 416 F.Supp. 1101 (U.S.D.C.No.D. Texas, 1976), decided after *Doran,* the statutes involved were Texas Penal Code sections 21.08 (Indecent exposure) and 42.01 (Disorderly conduct). The kernel of both statutes was exposure of the anus or genitals in a public place,

coupled with some specific intent or recklessness about offending others. The *Kew* court recognized that the statutes were directed primarily, "if not exclusively" at physical conduct, ". . . an activity which Texas has greater constitutional power to regulate than speech in general—even speech depicting or describing the same subject." (citing *Miller, supra*). 416 F.Supp. 1104. The *Kew* court went on:

> "In light of this recognition, plaintiff's challenge to the statutes for facial overbreadth is not compelling. It may be that one or more of the statutes in question could be applied to punish other conduct arguably protected by the First Amendment, such as application of Section 42.01(a)(10) to a nude ballet; but where the behavior condemned falls so far down the scale toward conduct as that treated by these statutes and so far from 'pure speech', overbreadth analysis becomes quite restricted. (Citing *Broadrick*) At this point on the speech-conduct spectrum, a conclusion that any of these statutes is facially overbroad would require a conclusion on our part that the amount of protected activity embraced by it is 'substantial . . . judged in relation to the statute's plainly legitimate sweep.' (citation omitted) This we are unable to do as to any of the statutes attacked."

Kew v. Senter, id.

The Indiana Supreme Court has decided this case in accordance with the principles of overbreadth litigation as enunciated by this Court in *Broadrick, supra;* it reached the same result as the Federal District Court in *Kew.*

Since appellants' conduct is unarguably within the power of the state to regulate (*LaRue, supra*), and the regulation itself is directed at a whole range of non-speech conduct amounting to public indecency and has but an incidental

or insubstantial effect on arguably protected speech when compared to its legitimate sweep, and is, moreover, plainly an exercise of legitimate police powers of the Legislature, the plaintiff has no standing to urge the First Amendment overbreadth exception. Having already failed to establish any *personal* infringement of a federally protected right (part one, *supra*), plaintiff-appellant also fails properly to raise the First Amendment issue on overbreadth grounds. It must therefore be concluded that plaintiff has failed to raise any substantial federal question, and this appeal should therefore be dismissed and the judgment of the state supreme court affirmed.

3. This court has already determined that there is no substantial federal question involved such that it should acquire jurisdiction to review the decision below.

As stated above, the identical Indiana Supreme Court decision, *State of Indiana v. Baysinger, et al.*, — Ind. —, 397 N.E.2d 580 was the subject of the appeal in *Clark v. Indiana,* No. 79-1325. This Court dismissed that appeal, holding that it did not present a substantial Federal question. (Memorandum opinion of May 12, 1980.) It follows that the State decision rested sufficiently on state grounds.

The May 12, 1980 order of this Court should be dispositive of the question whether the Indiana decision is appealable to this court, and judicial consistency would seem to require a dismissal of this second attack on the same decision.

CONCLUSION

For these reasons, Appellees respectfully move the Court to dismiss the appeal and affirm the judgment of the Indiana Supreme Court.

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APPENDIX A

ORDER LIST

MONDAY, MAY 12, 1980

APPEALS—SUMMARY DISPOSITION

* * * *

79-1325 *Clark, Sue v. Indiana and Lake County Prosecutor*

The appeal is dismissed for want of a substantial federal question. Mr. Justice Brennan and Mr. Justice Blackmun would note probable jurisdiction and set the case for oral argument.

* * * *